

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 27, 2021

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JASON H.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 2:20-CV-140-FVS

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 14, 15. This matter was submitted for consideration without oral argument. Plaintiff is represented by Attorney Rosemary B. Schurman. Defendant is represented by Special Assistant United States Attorney Jeffrey R. McClain. The Court has reviewed the administrative record, the parties' completed briefing, and is fully informed. For the reasons discussed below, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment, ECF No. 14, and **DENIES** Defendant's Motion for Summary Judgment, ECF No. 15.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~ 1

JURISDICTION

Plaintiff Jason H.¹ filed for Disability Insurance Benefits (DIB) on October 29, 2018, Tr. 74, alleging an onset date of February 20, 2018, Tr. 190, due to traumatic brain injury (TBI), posttraumatic stress disorder (PTSD), post deployment lung disease (constructive bronchiolitis), post deployment lung disease (pulmonary fibrosis), sleep apnea, chronic headaches, memory/concentration, left knee injury/chronic pain, neck pain (herniated/bulging discs), and mid back pain (herniated and bulging discs), Tr. 316. Plaintiff's application was denied initially, Tr. 114-16, and upon reconsideration, Tr. 122-28. Plaintiff amended his alleged onset date to September 16, 2015. Tr. 304. A hearing before Administrative Law Judge Stewart Stallings ("ALJ") was conducted on October 8, 2019. Tr. 37-73. Plaintiff was represented by counsel and testified at the hearing. *Id.* The ALJ also took the testimony of medical experts John Nance, Ph.D. and Lynee Jahnke, M.D. and vocational expert Tom Polsin. *Id.* The ALJ denied benefits on November 7, 2019. Tr. 15-26. The Appeals Council denied review on February 18, 2020. Tr. 1-5. The ALJ's November 7, 2019 decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §

¹In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's first name and last initial, and, subsequently, Plaintiff's first name only, throughout this decision.

1 405(g). Plaintiff requested judicial review of the ALJ decision by this Court on
2 April 5, 2020. ECF No. 1.

3 **BACKGROUND**

4 The facts of the case are set forth in the administrative hearing and transcripts,
5 the ALJ's decision, and the briefs of Plaintiff and the Commissioner.

6 Only the most pertinent facts are summarized here.

7 Plaintiff was 38 years old at the amended onset date. Tr. 190. He completed
8 two years of college in 2004. Tr. 317. Plaintiff's work history includes positions as
9 an office assistant, explosive ordnance disposal, assistant manager, and general
10 manager. Tr. 338. At application, Plaintiff stated that he stopped working on
11 September 11, 2012, because "[m]y condition was interfering with my work and I
12 was laid off." Tr. 317.

13 **STANDARD OF REVIEW**

14 A district court's review of a final decision of the Commissioner of Social
15 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
16 limited; the Commissioner's decision will be disturbed "only if it is not supported by
17 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158
18 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable
19 mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and
20 citation omitted). Stated differently, substantial evidence equates to "more than a
21 mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted).

1 In determining whether the standard has been satisfied, a reviewing court must
2 consider the entire record as a whole rather than searching for supporting evidence in
3 isolation. *Id.*

4 In reviewing a denial of benefits, a district court may not substitute its
5 judgment for that of the Commissioner. “The court will uphold the ALJ's conclusion
6 when the evidence is susceptible to more than one rational
7 interpretation.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008). Further,
8 a district court will not reverse an ALJ’s decision on account of an error
9 that is harmless. *Id.* An error is harmless where it is “inconsequential to the [ALJ’s]
10 ultimate nondisability determination.” *Id.* (quotation and citation omitted). The
11 party appealing the ALJ’s decision generally bears the burden of establishing that it
12 was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

13 **FIVE-STEP EVALUATION PROCESS**

14 A claimant must satisfy two conditions to be considered “disabled” within the
15 meaning of the Social Security Act. First, the claimant must be “unable to engage in
16 any substantial gainful activity by reason of any medically determinable physical or
17 mental impairment which can be expected to result in death or which
18 has lasted or can be expected to last for a continuous period of not less than twelve
19 months.” 42 U.S.C. § 423(d)(1)(A). Second, the claimant’s impairment must be “of
20 such severity that he is not only unable to do his previous work[,] but cannot,
21 considering his age, education, and work experience, engage in any other kind of

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §
2 423(d)(2)(A).

3 The Commissioner has established a five-step sequential analysis to determine
4 whether a claimant satisfies the above criteria. *See* 20 C.F.R. § 404.1520(a)(4)(i)-
5 (v). At step one, the Commissioner considers the claimant’s work activity. 20
6 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in “substantial gainful
7 activity,” the Commissioner must find that the claimant is not disabled. 20 C.F.R. §
8 404.1520(b).

9 If the claimant is not engaged in substantial gainful activity, the analysis
10 proceeds to step two. At this step, the Commissioner considers the severity of the
11 claimant’s impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers from
12 “any impairment or combination of impairments which significantly limits [his or
13 her] physical or mental ability to do basic work activities,” the analysis proceeds to
14 step three. 20 C.F.R. § 404.1520(c). If the claimant’s impairment does not satisfy
15 this severity threshold, however, the Commissioner must find that the claimant is not
16 disabled. 20 C.F.R. § 404.1520(c).

17 At step three, the Commissioner compares the claimant’s impairment to
18 severe impairments recognized by the Commissioner to be so severe as to preclude a
19 person from engaging in substantial gainful activity. 20 C.F.R. §
20 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the
21 enumerated impairments, the Commissioner must find the claimant disabled and

1 award benefits. 20 C.F.R. § 404.1520(d).

2 If the severity of the claimant's impairment does not meet or exceed the
3 severity of the enumerated impairments, the Commissioner must pause to assess the
4 claimant's "residual functional capacity." Residual functional capacity (RFC),
5 defined generally as the claimant's ability to perform physical and mental work
6 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
7 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing work that he or she has performed in the
10 past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is capable
11 of performing past relevant work, the Commissioner must find that the claimant is
12 not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of performing
13 such work, the analysis proceeds to step five.

14 At step five, the Commissioner considers whether, in view of the claimant's
15 RFC, the claimant is capable of performing other work in the national economy. 20
16 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner must
17 also consider vocational factors such as the claimant's age, education and
18 past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the claimant is capable of
19 adjusting to other work, the Commissioner must find that the claimant is not
20 disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable of adjusting to
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1 other work, analysis concludes with a finding that the claimant is disabled and is
2 therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

3 The claimant bears the burden of proof at steps one through four. *Tackett v.*
4 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the
5 burden shifts to the Commissioner to establish that (1) the claimant is capable of
6 performing other work; and (2) such work “exists in significant numbers in the
7 national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d 386,
8 389 (9th Cir. 2012).

9 **ALJ’S FINDINGS**

10 At step one, the ALJ found that Plaintiff had not engaged in substantial
11 gainful activity since the amended date of onset, September 16, 2015. Tr. 17. At
12 step two, the ALJ found that Plaintiff had the following severe impairments: obesity;
13 degenerative disc disease of the lumbar, cervical, and thoracic spine; pulmonary
14 fibrosis; historical TBI; and PTSD. Tr. 17. At step three, the ALJ found that
15 Plaintiff did not have an impairment or combination of impairments that meets or
16 medically equaled the severity of a listed impairment. Tr. 19. The ALJ then found
17 that Plaintiff had the RFC to perform light work as defined in 20 CFR § 404.1567(b)
18 with the following limitations:

19 The claimant can sit up to six hours, and can stand or walk up to six
20 hours, or an eight-hour workday with normal breaks. The claimant can
21 never climb ladders, ropes, or scaffolds, and can occasionally climb
ramps or stairs. The claimant can occasionally stoop, crouch, kneel,
and crawl. The claimant must avoid concentrated exposure to extreme

1 cold and excessive vibration. The claimant is precluded from all
2 exposure to moving or dangerous machinery, unprotected heights, and
3 excessive noise. The claimant is limited to low-stress positions without
4 production pace requirements, in a predictable setting with occasional
5 simple workplace changes in which concentration is not critical. The
6 claimant can handle brief and/or superficial public contact, and can
7 work near coworkers with occasional teamwork tasks.

8 Tr. 21.

9 At step four, the ALJ identified Plaintiff's past relevant work as an ordinance
10 artificer, and found that he was unable to perform his past relevant work. Tr. 24. At
11 step five, the ALJ found that considering Plaintiff's age, education, work experience,
12 and RFC, there were other jobs that exist in significant numbers in the national
13 economy that Plaintiff could perform, including: office helper; routing clerk; and
14 mailroom clerk. Tr. 25. On that basis, the ALJ concluded that Plaintiff was not
15 under a disability, as defined in the Social Security Act, from September 16, 2015,
16 through the date of his decision. Tr. 26.

17 ISSUES

18 Plaintiff seeks judicial review of the Commissioner's final decision denying
19 him Social Security Disability Insurance Benefits under Title II of the Social
20 Security Act. ECF No. 14. Plaintiff raises the following issues for this Court's
21 review:

1. Whether the ALJ properly considered Plaintiff's symptom statements; and
2. Whether the ALJ made a proper step five determination.

DISCUSSION

1. Plaintiff's Symptom Statements

Plaintiff argues that the ALJ erred in his treatment of Plaintiff's symptom statements. ECF No. 14 at 6-12.

An ALJ engages in a two-step analysis when evaluating a claimant's testimony regarding subjective pain or symptoms. "First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). "The claimant is not required to show that his impairment could reasonably be expected to cause the severity of the symptom he has alleged; he need only show that it could reasonably have caused some degree of the symptom." *Id.*

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal citations and quotations omitted). "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) ("[T]he ALJ must

1 make a credibility determination with findings sufficiently specific to permit the
2 court to conclude that the ALJ did not arbitrarily discredit claimant's testimony.")).
3 "The clear and convincing [evidence] standard is the most demanding required in
4 Social Security cases." *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014)
5 (quoting *Moore v. Comm'r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

6 Here, the ALJ found Plaintiff's medically determinable impairments could
7 reasonably be expected to cause some of the alleged symptoms; however, Plaintiff's
8 "statements concerning the intensity, persistence and limiting effects of these
9 symptoms are not entirely consistent with the medical evidence and other evidence
10 in the record for the reasons explained in this decision." Tr. 22. Specifically, the
11 ALJ found that Plaintiff's statements were inconsistent with his reported activities
12 and objective treatment. *Id.*

13 A. Reported Activities

14 The ALJ found that Plaintiff's reported activities of self-care, preparing meals,
15 caring for pets, riding a lawn mower, performing light yard work, vacuuming, doing
16 laundry, washing dishes, driving, shopping, handling finances, and interacting with
17 family and friends on a regular basis were inconsistent with his alleged level of
18 impairments and limitations, stating that "the claimant's level of activity is
19 minimally limited, and cannot be reconciled with the considerable severity alleged."
20 Tr. 22.

21 A claimant's daily activities may support rejecting symptom statements if (1)

1 the claimant's activities contradict his other testimony, or (2) "the claimant is able to
2 spend a substantial part of his day engaged in pursuits involving performance of
3 physical functions that are transferable to a work setting." *Orn v.*

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5 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603
6 (9th Cir. 1989)).

7 Primarily, the ALJ failed to state specifically what testimony was undermined
8 by Plaintiff's activities. Tr. 22. The Ninth Circuit has warned ALJs against using
9 simple household activities against a person when evaluating their testimony:

10 We have repeatedly warned that ALJs must be especially cautious in
11 concluding that daily activities are inconsistent with testimony about
12 pain, because impairments that would unquestionably preclude work
and all the pressures of a workplace environment will often be
consistent with doing more than merely resting in bed all day.

13 *Garrison*, 759 F.3d at 1016. Therefore, mere reference to these activities without
14 some finding that they undermine specific activities is not sufficient to support
15 rejecting Plaintiff's symptom statements.

16 The ALJ did state that the ability to handle finances was inconsistent with the
17 reported memory and concentration deficits, and the ability to drive and shop in
18 public stores for necessities was inconsistent with his fear of crowds. Tr. 22. The
19 ALJ failed to state that Plaintiff did not report that he did these activities well or for
20 extended periods. In fact, Plaintiff stated that "I forget at times to pay bills and have
21 to be reminded. Sometimes I forget to account for all of the bills when calculating

1 [the] monthly budget.” Tr. 357. He stated that he shops in stores for groceries and
2 gifts for about 30 to 40 minutes a week. Therefore, the inconsistencies of Plaintiff’s
3 reported activities and statements are not supported by substantial evidence, and this
4 reason is insufficient to meet the specific, clear and convenience standard.

5 **B. Objective Treatment**

6 The ALJ stated that “[t]he objective treatment record does not support a more
7 limiting residual functional capacity than addressed.” Tr. 22. The ALJ then pointed
8 to several objective findings throughout the record including sensation, motor
9 reflexes, strength, gait, and range of motion testing. *Id.* Therefore, the ALJ’s focus
10 is the objective evidence and not the amount or type of treatment.

11 Objective medical evidence is a “relevant factor in determining the severity of
12 the claimant’s pain and its disabling effects,” but it cannot serve as the only reason
13 for rejecting a claimant’s symptom statements. *Rollins v. Massanari*, 261 F.3d 853,
14 857 (9th Cir. 2001). Here, since the ALJ failed to provide other legally sufficient
15 reasons for rejecting the opinion, reliance on the objective medical evidence alone
16 does not support the ALJ’s determination. This case is remanded for the ALJ to
17 properly address Plaintiff’s symptoms.

18 **2. Step Five**

19 Plaintiff argues that the ALJ erred at step five because the RFC determination
20 that the vocational expert relied upon failed to incorporate limitations from
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1 pulmonary fibrosis, left knee impairment, TBI, headaches, cognitive issues,
2 depression, and cervical and thoracic impairments. ECF No. 14 at 12-19.

3 A claimant's RFC is "the most [a claimant] can still do despite [his]
4 limitations." 20 C.F.R. § 404.1545(a); *see also* 20 C.F.R. Part 404, Subpart P,
5 Appendix 2, § 200.00(c) (defining RFC as the "maximum degree to which the
6 individual retains the capacity for sustained performance of the physical-mental
7 requirements of jobs.")). In formulating an RFC, the ALJ considers the claimant's
8 symptom statements. *See, e.g., Bray v. Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219,
9 1226 (9th Cir. 2009). Since the case is being remanded for the ALJ to properly
10 address Plaintiff's symptom statements, the ALJ will formulate a new RFC on
11 remand.

12 Additionally, the Court noted that the ALJ's RFC determination failed to
13 specifically address Plaintiff's TBI and pulmonary impairments. First, the ALJ
14 failed to discuss how the limitations resulting from the TBI, which may include
15 Plaintiff's alleged headaches, were addressed in the RFC. Dr. Nance, the
16 psychological expert, testified that he did not consider limitations associated with
17 Plaintiff's TBI because those were physical limitations, not psychological
18 limitations. Tr. 50. Dr. Jahnke then testified that she considered the TBI "to be a
19 psychiatric issue. And so I don't comment on that at all." Tr. 59. The ALJ found
20 Dr. Nance's opinion to be partially persuasive, stating the following:
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1 Dr. Nance conceded that the claimant's TBI could cause or contribute
2 to mental limitations, but that the effect of TBI was not within his
3 expertise. The undersigned finds additional limitations in concentration
4 and adaptation tasks are necessary given the claimant's allegations of
5 problems handling stress and testing showing some cognitive
6 concentration problems.

7 Tr. 23. The ALJ found Dr. Jahnke's opinion to be highly persuasive. *Id.* In forming
8 the RFC, the ALJ failed to discuss how the TBI and the alleged associated
9 headaches were represented in the RFC. Neither the psychological expert nor the
10 medical expert were willing to provide any expert opinion regarding limitations
11 from the TBI. Therefore, the TBI and headaches are not accurately represented in
12 the RFC determination.

13 Second, the ALJ failed to state why the opined limitations resulting from the
14 pulmonary impairments were excluded from the RFC determination. Dr. Jahnke
15 opined that Plaintiff would need to avoid concentrated exposure to pulmonary
16 irritants because of the pulmonary fibrosis. Tr. 65. The ALJ found this opinion to
17 be highly persuasive. Tr. 23. However, this limitation was not included in the RFC
18 determination, and the ALJ failed to provide any explanation for the exclusion.
19 Therefore, upon remand, the ALJ will further address limitations from Plaintiff's
20 TBI, headaches, and pulmonary impairments.

21 CONCLUSION

The decision whether to remand for further proceedings or reverse and

1 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
2 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
3 where “no useful purpose would be served by further administrative proceedings, or
4 where the record has been thoroughly developed,” *Varney v. Sec’y of Health &*
5 *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by
6 remand would be “unduly burdensome[.]” *Terry v. Sullivan*, 903 F.2d 1273, 1280
7 (9th Cir. 1990); *see also Garrison*, 759 F.3d at 1021 (noting that a district court may
8 abuse its discretion not to remand for benefits when all of these conditions are met).
9 This policy is based on the “need to expedite disability claims.” *Varney*, 859 F.2d at
10 1401. But where there are outstanding issues that must be resolved before a
11 determination can be made, and it is not clear from the record that the ALJ would be
12 required to find a claimant disabled if all the evidence were properly evaluated,
13 remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir.
14 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

15 The Court finds that further administrative proceedings are necessary to
16 properly address Plaintiff’s symptom statements, make a new RFC determination,
17 and make a new step five determination. Therefore, the Court remands this case for
18 further proceedings consistent with this Order. Furthermore, the ALJ shall
19 supplement the record with any outstanding medical evidence, call a medical expert
20 to resolve the issue of limitations resulting from the TBI, and call a vocational expert
21 to address any step four or five determinations at remand proceedings.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **GRANTED**, in
3 **part**, and the matter is remanded for further proceedings consistent with
4 this Order.

5 2. Defendant's Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.

6 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
7 enter this Order and provide copies to counsel, enter judgment in favor of the
8 Plaintiff, and **CLOSE** the file.

9 **DATED** April 27, 2021.

10
11 *s/ Rosanna Malouf Peterson*
12 ROSANNA MALOUF PETERSON
13 United States District Judge
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